Supreme Court, U.S.
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(2)

No. 01-883

In The

# Supreme Court of the United States

GERALD D. BUSH &
CAROLYN BUSH,

*Petitioners,*

v.

CITY OF ZEELAND, MICHIGAN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Chief Judge Of The Court Of Appeals Of Michigan**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Michigan Court of Appeals violated Michigan Court Rule 7.217 or abused its discretion when it dismissed Petitioners' appeal for failure to obtain a trial transcript as a condition precedent to perfecting the appeal.

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings are correctly described in the petition.

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## STATEMENT OF JURISDICTION

*Certiorari* is not appropriate because the decision of the Michigan Court of Appeals does not conflict with an applicable decision of another state court of last resort, a United States court of appeals or this Court. Sup. Ct. R. 10(b), 10(c).

## STATEMENT OF THE CASE

Petitioners were sued in State court by Respondent as a result of improper storage of various items of property which met the definition of "junk" under Section 1.1100 of Respondent's City Ordinances. The trial court determined that the accumulation on Petitioners' four parcels of real estate, all located within the City of Zeeland, constituted a nuisance. To abate this nuisance, the court ordered Petitioners to clean up their property within a prescribed period of time. The court also provided:

> "In the event it is not voluntarily removed by defendants [Petitioners] the City [Respondent] shall have the right to remove any items remaining on defendants' four properties which are stored in violation of the Ordinance and dispose of it in any manner it deems appropriate including sale which it may apply to the cost of removal." Opinion and Order of the 20th Circuit Court, File No. 98-32500-NZ, Honorable Calvin L. Bosman presiding, dated June 21, 1999. See Res. App-3.

Petitioners filed a motion for rehearing pursuant to Michigan Court Rule 2.119(F), which was denied. Inasmuch as Petitioners did not voluntarily remove the items

referred to within the allotted time, Respondent did so. See Res. App-5.

Petitioners then filed a Claim of Appeal Of Right with the Michigan Court of Appeals on September 2, 1999. See Res. App-6. Michigan Court Rule 7.101 provides for appeals of right from decisions by various courts, including circuit courts. It also sets forth the manner of perfecting an appeal which includes the requirement that Petitioners: "Order in writing a copy of the full transcript and secure payment for it." Michigan Court Rule 7.101(C)(2)(d).

Petitioners failed to do so and were advised by the Court of Appeals on July 5, 2000 that their appeal was defective. They were given twenty-one (21) days to remedy the defect. Letter, Clerk of the Michigan Court of Appeals, dated July 5, 2000. See Res. App-7.

Petitioners failed to remedy the defect and their appeal was dismissed pursuant to Michigan Court Rule 7.217(A) for want of prosecution by failure to ensure the timely filing of the trial transcript. Michigan Court of Appeals Order, Chief Judge Richard A. Bandstra acting, dated September 25, 2000. See Res. App-8. A motion for reinstatement of appeal was then filed by Petitioners. The motion was denied. Michigan Court of Appeals Order, Chief Judge Richard A. Bandstra acting, dated November 6, 2000. Michigan Court of Appeals Docket Number: 221983. See Res. App-9.

An application for leave to appeal was then filed by Petitioners to the Michigan Supreme Court. The application was denied because the Michigan Supreme Court was "not persuaded that the questions presented should

be reviewed . . . ". Order of the Michigan Supreme Court dated May 29, 2001. Michigan Supreme Court Docket Number: 118147. See Res. App-10. At no time have Petitioners provided any court with the required transcript.

This case presents no federal question and has no far-reaching implications. Petitioners simply failed to comply with Michigan Rules of Court. The Michigan Court of Appeals ruling was proper in all respects and the Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

## ARGUMENT

### I.

### NEITHER THE RECORD NOR THE DECISION BELOW RAISE AN IMPORTANT FEDERAL QUESTION OR EVEN THE QUESTION PRESENTED BY THE PETITION

The case below rests on Petitioners' failure to comply with the requirements for the proper filing of an appeal of right in the Michigan Court of appeals. It involves but a single question: did the Petitioners properly order in writing a copy of the trial transcript and secure payment for it as required by Michigan Court Rule 7.101?

Although Petitioners urge that they complied with this requirement by presentation of a single letter to an unnamed individual, the letter falls far short of a specific request. See Pet. App-16. In addition, there is no evidence whatsoever in the record that Petitioners secured payment for the transcript.

Numerous arguments are raised by Petitioners in their Writ which relate to the actions by Respondent, its agents and the Michigan 20th Judicial Circuit Court. None of these arguments surmount the hurdle presented by the Petitioners' failure to properly perfect their appeal.

The order entered by the Michigan Court of Appeals was in accordance with the court rules prescribed by the Michigan Supreme Court under authority granted to it by the Constitution of the State of Michigan. That order was proper in all respects and does not call for a review by this Court.

## II.

## THE ORDER OF THE MICHIGAN COURT OF APPEALS WAS AN APPROPRIATE EXERCISE OF THE COURT'S AUTHORITY UNDER MICHIGAN LAW

The Constitution of the State of Michigan 1963, Article VI(1) provides for the creation of a Judicial Branch in the State of Michigan. Article VI(4) of that Constitution provides:

> "The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge."

This rule-making authority is exclusive to the supreme court of the state. *Darr v. Buckley*, 355 Mich. 392, 94 N.W.2d 837 (1959). Even the court of appeals has no inherent rule-making authority, since its limited authority

is derived from the supreme court. *People v. Sallee*, 63 Mich. App. 146, 234 N.W.2d 180 (1975).

The Michigan Supreme Court has established rules of court which, among other things, govern the procedure for appeals. Michigan Court Rules 7.101(C)(2)(d) sets forth the clear and unambiguous requirement that a transcript of the trial proceedings be ordered and payment for the same be secured. The importance of this requirement is reinforced in Michigan Court Rule 7.217, the appellate rule dealing with involuntary dismissals of appeals:

> RULE 7.217 INVOLUNTARY DISMISSAL OF CASES
>
> (A) Dismissal. **If the appellant,** or the plaintiff in an original action under MCR 7.206, **fails to order a transcript,** file a brief, or comply with court rules, **the clerk will notify the parties that the appeal may be dismissed for want of prosecution unless the deficiency is remedied within 21 days after the date of the clerk's notice of deficiency. If the deficiency is not remedied within that time, the chief judge or another designated judge may dismiss the appeal for want of prosecution.**
>
> (B) Notice. A copy of an order dismissing an appeal for want of prosecution will be sent to the parties and the court or tribunal from which the appeal originated.
>
> (C) Other Action. In all instances of failure to prosecute an appeal to hearing as required, the chief judge or another designated judge may take such other action as it deems appropriate.

> (D) Reinstatement. Within 56 days after the date of the clerk's notice of dismissal pursuant to this rule, the appellant or plaintiff may seek relief from dismissal by showing mistake, inadvertence, or excusable neglect. [Emphasis added]
>
> [Effective March 1, 1985; amended effective February 1, 1994; September 1, 1999.]

The Exhibits demonstrate that the Michigan Court of Appeals complied with this rule by informing Petitioners of their defect and advising them that their appeal would be involuntarily dismissed if it was not remedied. Petitioners have no claim that the Michigan Court of Appeals acted unreasonably, abused its discretion or otherwise violated the applicable court rules.

## III.

## THE WRIT DOES NOT SUGGEST AN IMPORTANT FEDERAL QUESTION

Dismissal of Petitioners' appeal under Michigan Rule 7.217 is a matter of state law and not a federal question. This conclusion is reached by a cursory examination of the Tenth Amendment to the United States Constitution, which governs powers reserved to states or the people:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

It is axiomatic that the power of each state to maintain a judicial branch of its government is an incident of

sovereignty of each of the states. *Gray v. Hakenjos*, 366 Mich. 588, 115 N.W.2d 411 (1962).

> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585 (1913).

The Writ urged by Petitioners has no far-reaching implications. As set forth above, it is a matter for the States to determine the jurisdiction of their appellate courts and to regulate those bodies by promulgation of rules of court. Petitioners show no facts which would support an argument that the rules were unfairly or arbitrarily applied to them; and they can show no such facts. The rule applied, Michigan Court Rule 7.217, makes clear the necessity to secure a trial transcript and is transparent with regard to the consequences of failure to do so. The proper application of Michigan Court Rule 7.217, the only matter before this Honorable Court, is the result of Petitioners' own acts.

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully Submitted,

KENNETH B. BREESE

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OTTAWA

CITY OF ZEELAND,
Plaintiff,

v.

GERALD BUSH and
CAROLYN BUSH,
Defendants,
_____/

OPINION AND ORDER
File No. 98-32500-CZ
Judge: Calvin L. Bosman

Plaintiff, City of Zeeland, brings this action seeking to abate a nuisance maintained by defendants. The City requests that this Court order defendants to remove various items described by the City as junk from four parcels of property owned by defendants. Each parcel owned by defendants is zoned residential. The four parcels are located at 724 E. Central Ave., defendant's residence, and other property located at 211 W. Main; 215 Alpine; and, 119 N. Centennial.

The items include but are not limited to the following:

at 211 W. Main – four unregistered motor vehicles;
at 215 Alpine – five unregistered motor vehicles;
at 119 N. Centennial – five unregistered motor vehicles;
at 724 E. Central – four unregistered motor vehicles.

Additionally, on the various properties are stored an auto transmission, an inoperable lawn mower, water tanks, numerous tires and various car parts.

Zeeland's ordinance prohibits the outside storage of unlicensed motor vehicles or disassembled motor vehicles on residentially zoned property. City Ordinance 303.8.1. Section 1.1100 of the Ordinance describes "junk" as:

> Any worn out or discarded materials including, but not necessarily limited to, scrap metal, inoperable motor vehicles and parts, construction material, household wastes, including garbage and discarded appliances, and yard debris.

Most of the items on the four properties fall under the Ordinance definition of junk, or unlicensed motor vehicles.

Defendant defends his action on the basis of double jeopardy as he has been previously criminally prosecuted by the City and the 58th District Court for maintaining these above described items on his property in violation of the Ordinance. Although the facts may be the same there is a difference between being criminally prosecuted twice for the same act and the City's efforts through a civil suit to abate a nuisance. The later is not a criminal action and criminal sanctions cannot be imposed and therefore does not constitute double jeopardy.

Defendant also claims: "The charge is vague and arbitrary and and therefore violates the Constitution First Amendment." Defendant cites some criminal cases in support of this claim. The Ordinance very clearly

describes the proscribed conduct. There is nothing vague about it at all.

Defendant also claims: The City is attempting to take from them property without just compensation contrary to the 5th and 14th Amendments of the United States Constitution. The City is not attempting to take any property from defendant. The City is merely attempting to get defendant to store his treasures in a lawful manner, something defendant cannot do on residentially zoned property unless it is stored within a building.

Finally: Defendant claims they "have the right to be left alone and right to pursue happiness". Defendant's argument is a veiled way of saying that zoning ordinances should not be enforced.

Defendant raises several other issues in his brief, none of which apply in this case.

The accumulated items located on the four properties are, for the most part, in violation of Zeeland's Ordinance. Maintaining them on the residential property in the fashion done by defendant does constitute a nuisance.

DEFENDANTS ARE HEREBY ORDERED To remove all such unlicensed and/or inoperable motor vehicles, all motor vehicle parts, inoperable machines and equipment and other items described by the Ordinance as junk which is not stored inside. Said removal shall be completed within 45 days from the date of this Opinion and Order. In the event it is not voluntarily removed by defendants the City shall have the right to remove any items remaining on defendant's four properties which are stored in violation of the Ordinance and dispose of it in

any manner it deems appropriate including sale which it may apply to the cost of removal. Neither defendant nor their agents shall interfere with the City's efforts to remove said property if not moved within the time allotted the defendants.

Dated: June 21, 1999

/s/ Calvin L. Bosman
Calvin L. Bosman
Circuit Court Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OTTAWA

CITY OF ZEELAND,

Plaintiff,

v.

GERALD BUSH and
CAROLINE BUSH,

Defendants.

OPINION
and
ORDER
File No. 98-32500-CZ

This is an action to abate a nuisance. Defendants bring a motion for "rehearing and temporary stay" of this Court's opinion and order of June 21, 1999.

Motions for rehearing are governed by MCR 2.119(F). "No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs." MCR 2.119(F)(2). MCR 2.119(F)(3) provides, in pertinent part: "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted."

This Court finds that defendants' motion merely presents the same issues ruled on by the Court in the opinion and order of June 21, 1999. Therefore, defendants' motion for rehearing and temporary stay is denied.

*It is so ordered.*

Dated: August 11, 1999

/s/ Calvin L. Bosman
Calvin L. Bosman, Circuit Judge

**STATE OF MICHIGAN**
**IN THE COURT OF APPEALS**

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CITY OF ZEELAND,
Plaintiff-Appellee

v

GERALD BUSH
CAROLYN BUSH
Defendants-Appellants

MCA ___
Lower crt #98-32500-CZ

---

GERALD D. BUSH
CAROLYN L. BUSH
724 E. Central
Zeeland, Michigan 49464
616-772-2398

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## CLAIM OF APPEAL OF RIGHT

Gerald and Carolyn Bush, Defendants, claim an appeal of right from the decision and order entered on June 22, 1999 and rehearing decision filed on August 13, 1999 in the Ottawa County Circuit Court by Judge Calvin Bosman.

The decisions and orders appealed from are attached to the Court of Appeals' Claim of Appeal MCR 7.204(C)(1).

Dated: Sept. 2, 1999

/s/ Gerald D. Bush
Gerald D. Bush

/s/ Carolyn Bush
Carolyn Bush

---

[LOGO]
**State of Michigan**

**Court of Appeals**

**Grand Rapids Office**

[Names and Addresses Omitted In Printing]

July 5, 2000

BUSH GERALD
724 E CENTRAL
ZEELAND MI 49464

RE: CITY OF ZEELAND V GERALD BUSH
Court of Appeals No. 221983
Lower Court No. 98-32500 CZ

Dear Appellant:

Our records indicate that you filed an appeal in this matter but have failed to perfect the appeal by acting to ensure the timely filing of the transcript. The matter is now eligible for INVOLUNTARY DISMISSAL or other action under MCR 7.217. If the transcript is not filed [or other appropriate action taken as outlined in our Internal Operating Procedure 7.210(B)(3)-2] within 21 days of the date of this letter, you will be assessed $200 costs and may suffer dismissal of the appeal (if you are retained counsel) or remand to the trial court for the appointment of substitute counsel (if you are appointed counsel).

If the parties have settled or appellant wishes to abandon the appeal, you may file a stipulation to dismiss (with defendant's affidavit if you are appointed counsel in a

criminal appeal). The stipulation must be signed by counsel of record for all parties pursuant to MCR 7.218.

Yours very truly,

/s/ LZ
Lori M. Zarcecki
Deputy Clerk

CG: CSTRONG
CC: BREESE KENNETH B

**IN THE MICHIGAN COURT OF APPEALS**

**ORDER**

RE: **City of Zeeland v. Gerald Bush**
Docket No. **221983**
L. C. No. **98-32500-CZ**

Richard A. Bandstra, Chief Judge, acting under MCR7.217(A), orders:

The above appeal is DISMISSED for want of prosecution, appellant having failed to ensure the timely filing of the transcript.

/s/ R. Bandstra

[SEAL]

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

| 9-25-00 | /s/ Carl L. Gromek |
|---|---|
| Date | Chief Clerk |

**IN THE MICHIGAN COURT OF APPEALS**

**ORDER**

RE: **City of Zeeland v. Gerald Bush**
Docket No. **221983**
L. C. No. **98-32500-CZ**

Richard A. Bandstra, Chief Judge, acting under MCR7.217(A), orders:

The motion for reinstatement of appeal is DENIED.

/s/ R. Bandstra

[SEAL] A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

11-6-00 /s/ Carl L. Gromek
Date Chief Clerk

**Order**

**Entered:** May 29, 2001

118147

CITY OF ZEELAND,

Plaintiff-Appellee,

v

GERALD D. BUSH and
CAROLYN L. BUSH,

Defendants-Appellants.

**Michigan Supreme Court**
**Lansing, Michigan**
[names Omitted In Printing]

SC: 118147
COA: 221983
Ottawa CC: 98-032500-CZ

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On order of the Court, the application for leave to appeal from the September 25, 2000, decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 29, 2001 /s/ Corbin R. Davis

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